



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for May 12, 2023

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Evan H. Nordby
Respondent: Social Security Administration
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2021-2280](#)
Petition for Review of MSPB No. DE-4324-19-0012-I-1
Issuance Date: May 11, 2023

STATUTORY CONSTRUCTION PAY AND BENEFITS

Petitioner Judge Nordby served as an Administrative Law Judge (ALJ) with the agency and also as a Judge Advocate General with the Army Reserve. From January through May 2017, he was activated to military service under 10 U.S.C. § 12301(d) to perform basic training in the Army Reserves. He requested differential pay pursuant to 5 U.S.C. § 5538(a) to account for the difference between his military pay and his ALJ pay. The agency denied his request on the basis that those called to voluntary active duty pursuant to section 12301(d), like Judge Nordby,

were not entitled to differential pay.

Judge Nordby appealed the agency's decision to the Board, and an administrative judge issued an initial decision dismissing the appeal for failure to state a legally cognizable claim. Judge Nordby appealed the administrative judge's decision to the U.S. Court of Appeals for the Federal Circuit.

Holding: Voluntary activations of reservists to active duty under 10 U.S.C. § 12301(d) do not necessarily entitle such employees to differential pay under 5 U.S.C. § 5538(a).

1. The court noted that an employee is entitled to differential pay if he meets the statutory requirements of 5 U.S.C. § 5538(a). That provision states that only those called to perform active duty under a "call or order to active duty under . . . a provision of law referred to in 10 U.S.C. § 101(a)(13)(B)" qualify.
2. Section 101(a)(13)(B), in turn, defines a "contingency operation" as a call to order under specific enumerated statutes, or under "any other provision of law during a war or national emergency."
3. Judge Nordby was called to duty under 10 U.S.C. § 12301(d), which provides for voluntary activation of a reservist to active duty, and is not specifically enumerated under 10 U.S.C. § 101(a)(13)(B). Because section 12301(d) is not specifically enumerated under 10 U.S.C. § 101(a)(13)(B), the only way Judge Nordby would be entitled to differential pay is if section 12301(d) qualifies as a "provision of law during a war or national emergency."
4. As in its prior decision in *Adams v. DHS*, 3 F.4th 1375 (Fed. Cir. 2021), the court restated that voluntary duty under 10 U.S.C. § 12301(d) only entitles a Federal employee to differential pay if there is "a connection between his voluntary military service and the declared national emergency." The fact that an employee's voluntary military service coincided with national emergency is insufficient to entitle him to differential pay.
5. Because Judge Nordby did not allege any connection between his service and the declared national emergency other than a temporal overlap between his activation and the emergency, like the petitioner in *Adams*, he does not qualify for differential pay.
6. The Federal Circuit distinguished its prior decision in *O'Farrell v. DOD*, 882 F.3d 1080 (Fed. Cir. 2018) on the basis that the employee in that case indirectly supported a "contingency operation" by replacing a Navy member who was deployed to Afghanistan to support a declared national emergency, and so his activation was

connected to the emergency.

NONPRECEDENTIAL:

Scott v. Merit Systems Protection Board, [2023-1134](#) (Fed. Cir. May 9, 2023) (DA-0752-22-0408-I-1) (per curiam). The court affirmed the dismissal of the petitioner's appeal challenging her removal as untimely filed without good cause shown for her delay. The court determined that the administrative judge did not abuse his discretion in concluding that the petitioner failed to establish good cause for her 6 week delay in filing her Board appeal based on her medical and family considerations or due to her failure to regularly check her email.

Williams v. Department of the Navy, [2023-1010](#) (Fed. Cir. May 11, 2023) (DC-3330-16-0292-B-1) (per curiam). The petitioner challenged the Board's decision which affirmed the initial decision denying his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA) based on the agency's failure to select him for a position. The petitioner argued that the agency violated his veterans' preference rights including his right to compete and his pass-over procedural rights when it filled the position pursuant to an expedited hiring authority (EHA) instead of through the candidate referral list, and that the agency failed to follow its own internal notice requirements for using the EHA. The court disagreed, concluding that the agency did not deny the petitioner the right to compete for the position by failing to select him or by filling the position under the EHA procedures. The court also agreed that the agency did not violate the petitioner's pass-over rights and that any failure by the agency to properly notice the use of the EHA in the vacancy announcement was harmless and did not affect the petitioner's right to compete for the position.

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